



S-198931

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

WEEDS GLASS & GIFTS LTD. and 1179711 B.C. Ltd.

PETITIONERS

AND

THE CORPORATION OF THE CITY OF GRAND FORKS

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

The Corporation of the City of Grand Forks
7217 – 4th Street
P.O. Box 220
Grand Forks, B.C.

Ministry of Attorney General
Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below by

[X] the person named as Petitioner in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 28 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1		
(2)	The ADDRESS FOR SERVICE of the Petitioners is: Davison Law Group Suite 1650-1130 West Pender Street Vancouver, BC V6E 4A4 Fax number address for service of the petitioners: 604.629.7810 E-mail address for service of the petitioners: N/A		
(3)	The name and office address of the Petitioners' lawyer is: Dean P. Davison Davison Law Group Suite 1650-1130 West Pender Street Vancouver, BC V6E 4A4		

Claim of the Petitioners

Part 1: ORDERS SOUGHT

1. A declaration that the Corporation of the City of Grand Forks' application procedures pursuant to section 490(1)(a) the *Local Government Act* [RSBC 2015] ch.1 (the "*Local Government Act*") are contrary to section 536(1) of *Local Government Act* and is invalid.
2. A declaration that the decision of the Corporation of the City of Grand Forks to deny the Petitioners' Development Variance Permit Application on July 15, 2019 (the "Decision") is invalid for lack of procedural fairness.

3. A declaration that the Decision of the Corporation of the City of Grand Forks was incorrect and/or unreasonable.
4. An order that the Decision be set aside.
5. A declaration that the decision of the Corporation of the City of Grand Forks to accept the report of the Business Licence Inspector (the "Report Decision") is invalid for lack of procedural fairness.
6. A declaration that the Report Decision of the Corporation of the City of Grand Forks was incorrect and/or unreasonable.
7. An order that the Report Decision be set aside.
8. Costs on Scale C under the *Supreme Court of British Columbia Civil Rules* Appendix B, or in the alternative, costs on Scale B. under the *Supreme Court of British Columbia Civil Rules* Appendix B
9. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

1. The Petitioner Weeds Glass & Gifts Ltd. ("Weeds") is a federal corporation that is extra provincially registered in British Columbia, and has a registered office at 601 – 510 Hastings Street West, Vancouver, BC V6B 1L8 and, for the purposes of these proceedings, an address for service at 1650 – 1130 West Pender Street, Vancouver, BC V6E 4A4.
2. The Petitioner 1179711 B.C. Ltd. is a British Columbia company with a registered office at 1350 William Street, Vancouver, BC V5L 2P5.
3. The Respondent the Corporation of the City of Grand Forks (the "City") is a municipal corporation under the *Local Government Act*, R.S.B.C. 1996, c. 323.
4. On or about February 13, 2019, an agreement in the form of an Offer to Lease was signed by Weeds and 1179711 B.C. Ltd., where 1179711 B.C. Ltd. offered to lease the premises located at 7500 Donaldson Drive, Grand Forks, BC V0H 1H2 (the "Premises") as owner to Weeds.
5. In executing the Offer to Lease, it was the intention of both Weeds and 1179711 B.C. Ltd. to operate a retail cannabis location at the Premises in order to provide reasonable access to cannabis both for non-medical and medical consumers of cannabis. On May 15, 2017, during a Council meeting, discussions regarding cannabis dispensaries were raised, where members of City council (the "Council") explicitly stated that they supported the use of medical marijuana and the tremendous amount of help that it provides individuals that require them, which includes seniors, and in particular, the City's surrounding region has a higher population of elderly who would require reasonable access to cannabis products for medical reasons.
6. On or about April 17, 2019, Jim Kennedy ("Mr. Kennedy"), acting as agent for Weeds submitted the Cannabis Retail Store Licence Application: Corporation through the Province of British

Columbia, on behalf of Weeds for a proposed cannabis retail store at the Premises (the "Provincial Retail Cannabis Application").

7. On or about April 29, 2019, Mr. Kennedy received an email from Leford Lafayette ("Mr. Lafayette"), delegate of the Director of the Development and Engineering department for the City, regarding the Provincial Retail Cannabis Application:
 - a. "Please advise whether you wish to proceed with your application for Non-Medical Cannabis Retail Store Licence at 7500 Donaldson Drive.
 - b. We have received notification of your application for a Non-Medical Cannabis Retail Store Licence for 7500 Donaldson Drive, however upon preliminary review we note that the proposed location is less than the required 100 m distance from a community use zone. An excerpt of the zoning bylaw is attached for your convenience. A consolidated version of the zoning bylaw can be accessed from the following City of Grand Forks link <https://www.grandforks.ca/wp-content/uploads/bylaws/By2039-Zoning-Bylaw-2039-CONSOLIDATED-with-SCHEDULES.pdf>
 - c. As you may already know, council rejected the last application that did not meet the setback distance requirement from a community use zone and from a youth centered facility.
 - d. If you wish to proceed with the application please complete and submit the attached business licence application along with the applicable fee. You will also need to complete and submit the development variance permit application attached along with the application fee.
 - e. Please advise whether or not you wish to proceed with the application so that I can advise the Liquor and Cannabis regulation Branch accordingly. I understand that there may be an opportunity for you to get a refund of your application fee under limited circumstances."
8. On or about May 14, 2019, Mr. Kennedy, acting as agent for 1179711 B.C. Ltd. and Weeds, or in the alternative, either of them, submitted a Development Variance Permit Application Package, which enclosed the development variance permit application form, an Appendix A specifying the reasons for the request to vary, and the first affidavit of Alice Huynh sworn May 9, 2019 in relation to the matter/application (collectively, the "Development Variance Permit Application").
9. On or about June 5, 2019, Mr. Kennedy, wrote an email to Mr. Lafayette requesting confirmation as to the schedule of the public feedback session, and whether he will have an opportunity to speak at that session.
10. On or about June 6, 2019, by email response to Mr. Kennedy's email dated June 5, 2019, Mr. Lafayette provided the following schedule to Mr. Kennedy:

Table 1 Timeframe	
ACTIVITY	TIMING
<i>Committee of the Whole – Public Introduction of Application</i>	<i>June 10, 2019</i>
<i>Regular Council Meeting – Council Direct staff to proceed with statutory notice (letters to adjacent property owners and notice in 2</i>	<i>June 10, 2019</i>

<i>issues of the local paper)</i>	
Letters sent to adjacent property owners	June 11, 2019
Notice published in two consecutive issues of the newspaper	June 12 & June 19, 2019
Deadline for receiving written feedback	June 24, 2019
Regular Council Meeting	June 24, 2019
<ul style="list-style-type: none"> • Staff report on written feedback received • Council decision on DVP Application • Council decision and direction to staff to send a letter of RECOMMENDATION or REJECTION of the Non-Medical Cannabis Retail Store Licence application to the LCRB 	

11. On or about July 5, 2019, Mr. Kennedy emailed Mr. Lafayette to confirm the next steps of the process in relation to Council's decision regarding the Development Variance Permit Application.
12. By email dated July 8, 2019, Mr. Lafayette informed Mr. Kennedy that the updated schedule for the Development Variance Permit Application is to proceed to the regular council meeting scheduled on July 15, 2019.
13. On or about July 8, 2019, Mr. Kennedy sent an email to Mr. Lafayette for additional information since the public hearing. The following are excerpts from said email:
 - a. "Will there be any input from citizens, etc. during that meeting? The last meeting the citizens seemed to want a time in the evening for providing feedback on the development variance permit. Is that request being fulfilled? Or is it just a decision being made on the 15th? Has the municipality considered any other feedback from the community since the last meeting? Are you able to share this feedback with me?"
 - b. Please also note that we have given Whispers of Hope notice for the warming centre to vacate the premises by July 31, 2019."
14. The Whispers of Hope not for profit organization was using the Premises in question as a warming centre for the homeless while the Petitioners awaited their licence. The City was dealing with complaints related to the warming centre and had directed the Petitioners to no longer allow the Premises to be used by the homeless. This was a contentious issue repeatedly raised by the City during the licence and variance process.
15. On or about July 8, 2019, Mr. Lafayette responded to Mr. Kennedy's email, and stated the following:
 - a. "As was previously conveyed to you, the formal opportunity to speak to your application for the development variance permit (DVP) application and the hours of operation, was at the committee of the whole. Notwithstanding the foregoing, I understand that with a majority vote of council you may have the opportunity to speak further during the regular meeting. There may also be an opportunity to speak during the public session at the end of the meeting.

- b. As previously discussed, from a planning perspective the DVP and the current use of the property as a warming shelter are separate items. In any event I will pass on, to council, the information that you provided regarding your giving Whispers of Hope notice to vacate the premise by July 31, 2019.
 - c. Should you have any further questions, please don't hesitate to give me a call."
- 16. On July 15, 2019, counsel for the Petitioners sent a letter to Council Members of the City by email to Mr. Lafayette, which sought to clarify some points raised since the Committee of the Whole Meeting on June 10, 2019.
- 17. By email dated July 16, 2019, Mr. Lafayette stated the following in relation to the letter sent by counsel on July 15, 2019:
 - a. "The deadline for submissions to the council meeting agenda is approximately 2 weeks before the meeting.
 - b. As I tried to explain yesterday, council days are very busy days for us and we often times do not have much opportunity to sit at our desks. Yesterday was no exception and I was not able to get to my desk and your email until now so unfortunately your email did not get forwarded.
 - c. I have forwarded your letter to my supervisor so that she can disseminate it appropriately."
- 18. The meeting of City Council went ahead on July 15, 2019 and the Petitioners were denied the opportunity to have their submissions included.
- 19. On or about July 19, 2019, Alice Huynh, lawyer at Davison Law Group, the firm representing the Petitioners, spoke with Mr. Lafayette by telephone, who advised her that the City currently does not have a Board of Variance established.
- 20. On August 13, 2019, Alicia Mackenzie, legal assistant from Davison Law Group, spoke with the City to request the minutes for the Regular Meeting on July 15, 2019, as the City had not provided them on their website, and was informed by staff that they had just received the minutes and would be posting them this afternoon. The minutes were posted this afternoon on August 15, 2019.
- 21. The minutes provided that the City Council had made the Decision and the Report Decision, the result of which is that the Petitioners were denied their Development Variance Permit Application and that the report of the Business Licence Inspector, which provided that the Petitioners' application for a provincial cannabis license should be denied, would be sent to the Province for determination of Weeds' license application.

Part 3: LEGAL BASIS

- 1. The Petitioners rely on:
 - a. *BC Supreme Court Civil Rules*;
 - b. *Community Charter*, SBC 2003, c 26;

- c. *Judicial Review Procedure Act*, RSBC 1996, c 241;
 - d. *Local Government Act*, RSBC 2015, c 1;
 - e. *City of Grand Forks Zoning Bylaw 2039-A1 and Zoning Bylaw 2039-A3*;
 - f. *City of Grand Forks Bylaw 2053*;
 - g. *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, The Charter of Rights and Freedoms* (the “Charter”);
 - h. the common law; and
 - i. the inherent jurisdiction of the Court.
2. The Petitioners rely on and repeats the statements in the Factual Basis.
 3. “(1) An application to the Supreme Court to set aside a municipal bylaw or another municipal instrument may be made by
 - (a) an elector of the municipality, or
 - (b) a person interested in the bylaw, order or resolution, as applicable.
 (2) On an application under subsection (1), the Supreme Court may
 - (a) set aside all or part of the municipal instrument for illegality, and
 - (b) award costs for or against the municipality according to the result of the application.
 (*Local Government Act*, ss. 623(1) and (2))
 4. “(1)A local government that has adopted a zoning bylaw must, by bylaw, establish a board of variance.
 (2)A person is not eligible to be appointed to a board of variance if the person is
 - (a)a member of the local government or the advisory planning commission, or
 - (b)an officer or employee of the local government.”
 (*Local Government Act*, ss. 536(1) and (2))
 - 5. Procedural requirements that have been prescribed by the Legislature for the exercise of a local government power are extremely significant, as a local government’s failure to follow the prescribed procedure will generally render its action ultra vires.
 (*Hornby Island Trust Committee v. Stormwell* (1988), 30 B.C.L.R. (2d) 383 (C.A.), para 7)
 (*London (City) v. RSJ Holdings Inc.*, 2007 SCC 29), para 40)
 - 6. Whether a municipal body is acting to adopt or amend a bylaw or exercise their statutory power to make a decision or pass a resolution, it is required that they act within their statutory requirements when doing so.
 - 7. Currently, the City does not have a board of variance established as required under s. 536 (1) and (2) of the *Local Government Act*, and accordingly, the City’s failure to follow the prescribed procedures under the *Local Government Act* would render its action to deny the Petitioners’ Development Variance Permit Application ultra vires and their decision should be quashed.
 - 8. Administrative decision makers like the Director owe a duty of procedural fairness to those affected by a decision. According to this duty, the individuals affected should have the opportunity to present their case fully and fairly, and have the decisions affecting their rights,

interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(*Baker v Canada (Minister of Citizenship and Immigration)*), [1999] 2 SCR 817 [“Baker”], para. 28)

9. The following non-exhaustive factors are relevant to determining the content of the duty of fairness in relation to an individual’s participatory rights:

- a. the nature of the decision being made and the process followed in making it.
- b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates.
- c. the importance of the decision to the individual or individuals affected.
- d. the legitimate expectations of the person challenging the decision.
- e. the choices of procedure made by the agency itself.

(*Baker* at paras. 23-27)

10. In addition to the non-exhaustive factors relevant to determining the content of the duty of fairness, the elements that often require consideration in relation to local government decision-making are the following:

- a. an unbiased decision-maker;
- b. notice of the decision;
- c. an opportunity to make representations;
- d. access to local government information relevant to the decision; and
- e. provision of reasons for the decision.

11. While it was unrealistic to expect council members to come to a hearing “without some knowledge of the situation and without some inkling as to the appropriate disposition”, they must come “completely open to a fresh evaluation of the evidence and submissions presented to them” at the owner’s hearing on the remedial action requirement.

(*McLaren v. Castlegar (City)*, 2011 BCCA 134 at paras. 36 and 37)

12. The use of the Premises as a homeless warming centre became a heated issue with the City and created a bias in the Council Member’s decision even though it should have been a factor unrelated to the Decision and the Report Decision.

13. Local government bodies are required to provide reasons for their decision, which the Court affirmed in the Supreme Court of Canada’s 2004 decision, where Quebec municipal council did not provide reasons for their decision to deny rezoning land for a Jehovah’s Witness assembly hall.

(*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, paras 1 and 2)

14. Although the Petitioners received the minutes of the Regular Meeting that occurred on July 15, 2019, nearly a month after the Decision and Report Decision by Council Members were rendered in relation to the Petitioners’ Development Variance Permit Application and the Report Decision was made to approve the report of the Business License Inspector, the minutes do not provide reasons for these decisions, and accordingly, lacks procedural fairness.

15. “Procedural fairness requirements in administrative law are not technical, but rather functional in nature. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it.”

(*Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 para. 65)

16. The Petitioners apply under the *Local Government Act* as well as under the *Judicial Review Procedure Act*, RSBC 1996, c 241 for an order that the Decision of the City Council Members' in denying the Petitioners' Development Variance Permit Application and the Report Decision to approve the report of the business license inspector be quashed, set aside for illegality, or otherwise declared invalid and set aside.
17. A series of cannabis related cases, including *R v Parker*, (2000) 49 OR (3d) 481, 188 DLR (4th) 385 (ONCA), *Hitzig v Canada (Attorney General)* (2003), 2003 CanLII 30796 (ON CA), *Sftekopoulos v Canada (Attorney General)*, [2008] 3 FCR 399, aff'd 2008 FCA 328, *R v Beren*, 2009 BCSC 429, 192 CRR (2d) 79, *R v Smith*, 2015 SCC 34, and most recently *Allard v. Canada*, [2016] 3 FCR 303, 2016 FC 236 ("*Allard*") have upheld a person's right under the Charter to reasonable access to cannabis for medical purposes. In *Allard*, the Court stated that "dispensaries are at the heart of cannabis access".

(*Allard*, para 162)
18. As the Decision engages section 7 of the Charter by infringing on the rights of reasonable access to cannabis of patients who use such cannabis for medicinal purposes through the strict application of the 100 meter rule, the standard of review by any administrative tribunal when it engages an appellant's constitutional rights, will be that of correctness.

(*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 58 [*Dunsmuir*])
19. Refusal by the City to grant the Petitioners' Development Variance Permit Application has resulted in a lack of reasonable access to cannabis in the City for people who rely on it for medical purposes; and the Report Decision will do likewise if it results in Weeds being denied a cannabis retail license by the Province.
20. "Interpretation and application of the Charter are sufficiently outside the ambit of an adjudicator's home statute that the correctness standard is invoked."

(as cited by *Tsogas v. British Columbia (Superintendent of Motor Vehicles*, 2016 BCSC 1742 at para. 26, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654 at para. 30)
21. Alternatively, or in addition to the foregoing argument for the standard of review being one of correctness, decisions of an administrative body that involve mixed questions of fact and law are reviewable by the Courts on a standard of reasonableness.

(*Northland Properties Corporation v. British Columbia (Liquor Control and Licensing Branch)*, 2011 BCSC 160 at para. 72; *Dunsmuir* at para. 51)
22. According to this standard, a reasonable decision is one which "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

(*Dunsmuir* at para. 47)
23. In applying the reasonableness standard, courts should inquire into the qualities that make a decision reasonable, referring both to the process of articulating reasons and to the ultimate outcome of the decision.

(*Dunsmuir* at para. 47)

Costs

24. The Petitioners seek costs on Scale C the grounds that they have brought this Petition, which is a matter of public interest to, at the very least, the residents of the City and has significant societal impact and impact on not only the City but other municipalities. The benefit of this Petition is not only for the Petitioners but also for their neighbours and fellow residents of the City who require reasonable access to cannabis for both medical and non-medical reasons.

(*Victoria (City) v. Adams*, 2009 BCCA 563, para 188)

(*Sevin*, paras 136-150)

(*Carter v. Canada (Attorney General)*, [2015] 1 SCR 331, 2015 SCC 5)


25. Alternatively, the Petitioners seek costs at Scale B.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Alicia Mackenzie, sworn 13 August 2018;
2. Such further and other materials as the Petitioners may advise.

The Petitioners estimate that the hearing of the petition will take 1 day.

Date: August 14, 2019



Signature of lawyer for the Petitioners,
Alice Huynh

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

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Date:

Signature of ☐ Judge ☐ Master